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November 2, 2000

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
 Federal Communications Commission
 TW-A325
 445 12th Street, S.W.
 Washington, DC 20554

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 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

Re: CC Docket No. 98-141; ASD File No. 99-49

DA 00-2367 (CompTel's Petition for Reconsideration of the Modification of the SBC/Ameritech Merger Conditions)

Applications of Ameritech Corp., Transferor, And SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines

Dear Ms. Salas:

Enclosed please find an original plus nine copies of the Comments of Advanced TelCom Group, Inc., in the above-captioned proceeding. Please note that five copies are for circulation to the Commissioners.

Please stamp the enclosed copy and return it with the messenger.

Sincerely,

Holly Rachel Smith
Counsel for Advanced TelCom Group, Inc.

Enclosures

cc: Anthony Dale, Common Carrier Bureau
 International Transcription Service

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	
)	
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And SBC Communications, Transferee, For)	
Consent to Transfer Control of Corporations)	ASD File No. 99-49
Holding Commission Licenses and Lines)	

**COMMENTS OF ADVANCED TELCOM GROUP IN SUPPORT OF
PETITION FOR RECONSIDERATION OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

Advanced TelCom, Inc. dba Advanced TelCom Group ("ATG") files these comments in response to the FCC's Public Notice of October 19, 2000, in which the Commission requested comments on the Petition for Reconsideration of the Competitive Telecommunications Association ("CompTel") in this proceeding.

Summary

ATG supports the CompTel petition in its entirety. ATG urges the Commission to take action on the CompTel petition quickly, rather than addressing and re-addressing these issues over time in other proceedings. The decision on the CompTel petition is critical, because SBC is using the interim period to steal a march to market on its competitors through the legerdemain of asset shuffling and redefinition. The actions which SBC has already taken, and the opportunity that it will have, in the absence of speedy and definitive Commission action on the CompTel petition, undermine the FCC's goal of creating a non-discriminatory, competitive marketplace for advanced telecommunications services, limiting the opportunity for customers to choose an alternative provider and for providers to reach customers with alternative technologies.

I. SBC's Affiliate Will Be Purchasing ILEC-Combined UNE Combinations

ATG supports CompTel's request that the FCC find that the elements of the Project Pronto network architecture which SBC will provide to its affiliate, ASI, are in fact voluntarily-combined UNEs which SBC will provide for its affiliate and others.¹

The significance of this requirement was underlined in the "Project Pronto Industry Collaborative" presented by SBC which ATG attended in Dallas, Texas on October 24, 2000. SBC representatives were asked repeatedly at that meeting how non-pricing issues, which could not be resolved between SBC and a CLEC as to Project Pronto features and ordering, would be resolved. SBC argued that "consultation" would occur, and could not point to any other forum in which a CLEC might be able to obtain anything which SBC was unwilling to provide. This lack of an effective remedy flows directly from the fact that the Commission has not ruled that the Project Pronto architecture is composed of UNEs, which SBC is combining to meet the specific technology needs of its affiliate.

Without the definition of the Project Pronto architecture as UNEs, Project Pronto is a problem, rather than an opportunity for competition. Where SBC retains essentially unbridled discretion on how to provide competitors with the use of the portion of the SBC network which is Project Pronto, it retains the ability to dictate unilaterally how and where its competitors will obtain access to the Project Pronto elements of the SBC network, and what price these wholesale customers will pay to compete with the advanced services which SBC offers its customers.²

¹ See footnote 4 of CompTel petition.

² The Commission recognizes the vital role that state commissions have played in examining and correcting the ILECs' versions of proper UNE pricing. SBC's assurances that its pricing of the Project Pronto elements is similar to rates approved by state commissions under FCC rules, while SBC offers competitive services through an unregulated affiliate, is hardly reassuring. The opportunity and temptation for anticompetitive activity are apparent and real.

There is nothing unique about the Project Pronto network which logically makes it legally different than other portions of the SBC telecommunications network. The network is used to provide telecommunications services, and SBC has competitors for those services. Nothing about the creation of SBC's data affiliate changes this essential fact. In order to fulfill the letter and the promise of the Federal Telecommunications Act, it is imperative that the Commission quickly recognize that Project Pronto is subject to the same unbundling definitions and requirements as are other portions of the SBC network.

The Commission also concludes that incumbent LECs are required to provide access to network elements in a manner that allows requesting carriers to combine such elements as they choose, and that incumbent LECs may not impose restrictions upon the uses to which requesting carriers put such network elements.

Under section 251(c)(3), incumbent LECs must provide access to "unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide" a telecommunications service. ... (T)his language bars incumbent LECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled elements that would impair the ability of requesting carriers to offer telecommunications services in the manner they intend. For example, incumbent LECs may not restrict the types of telecommunications services requesting carriers may offer through unbundled elements, nor may they restrict requesting carriers from combining elements with any technically compatible equipment the requesting carriers own. We also conclude that section 251(c)(3) requires incumbent LECs to provide requesting carriers with all of the functionalities of a particular element, so that requesting carriers can provide any telecommunications services that can be offered by means of the element. We believe this interpretation provides new entrants with the requisite ability to use unbundled elements flexibly to respond to market forces, and thus is consistent with the procompetitive goals of the 1996 Act.³

The services which SBC offers its own customers, via the Project Pronto portion of its network, consist of the network elements of that service, which the Commission has defined as UNEs: loops, switching, transport, and so on. If SBC is allowed to redefine this particular portion of its network as consisting of "services" rather than UNEs, even for an

³ First Report and Order, CC Docket No. 96-98, para. 5, 292, August 1, 1996.

interim period, SBC will have the ability to engage in precisely the sort of anticompetitive behavior which the FCC has sought to prohibit from the time of its very first actions applying the Federal Telecommunications Act of 1996.

SBC itself has recognized that this portion of its network consists of UNEs. In fact, SBC originally requested a waiver of the Merger conditions for the deployment of Project Pronto as a series of unbundled elements. As late as April 6, 2000, SBC described Project Pronto as an unbundling plan and listed for the FCC, via an ex parte letter, the unbundled network elements that comprise Project Pronto in a rate table that detailed which unbundled elements will contain recurring and non recurring charges.⁴ Moreover, SBC also plainly understood and expressly communicated to the CLEC community the ILEC's obligation to provide access to the Project Pronto architecture pursuant to the FCC's rules and regulations implementing the Telecommunications Act of 1996. In a March 1, 2000 presentation to the CLEC community, representatives of SBC stated, "Obviously, if the FCC were to approve [the waiver] and we were to own [the ADLU card], this would become a UNE subject to whatever, you know, regulation that goes along with that."⁵ Mr. Samson, of SBC's network regulatory organization extolled at length the benefits of SBC owning the ADLU cards for Project Pronto, so that

if the FCC were to allow that, we could buy all those cards, unbundle it at a UNE rate and we would be able to purchase the mass volumes and perhaps arguably get a discount. And so that might be an upside to SBC ownership of the card...(I)f SBC were to own the card and just unbundle it as a UNE and then we'll deploy them in all the RTs. And that, you know, I think speaks to a real benefit we would see at the RT location for card ownership.⁶

⁴ Letter from Kellogg, Huber, Hansen, Todd & Evans on behalf of SBC Communications, Inc. to Ms. Magalie Roman Salas, Esq., Secretary, FCC, at 6, CC Docket 98-141. (April 6, 2000).

⁵ March 1, 2000 Project Pronto Product Overview transcript, at 108:12-15, (March 1, 2000) ("March 1 Transcript").

⁶ March 1 Transcript at 148:21-149:1 and 150:11-15.

It was not until almost 90 days after SBC's initial request for a waiver that SBC suddenly changed its gloss on Project Pronto from an "unbundling plan" to a "broadband service".⁷

Did this change perhaps reflect a substantive or technical change in the Project Pronto network? To the contrary, from SBC's initial request for a waiver until now there has been no substantive change in the design of the architecture that would support a conversion of Project Pronto from an offering of unbundled elements to an offering of a service. As Mr. Deere, an SBC expert witness on network design, stated little more than a week ago, while reviewing two drawings of the Project Pronto architecture:

Q: ... To your knowledge did the design of the Project Pronto architecture change in any substantive manner between March 1st and August 11th?

A: No, I think the difference is probably just two different engineers drew it, and how much detail they put into the two frames is the only difference... So I think it's no different in design; it's just a difference in who drew the picture.⁸

Thus the only significant changes in Project Pronto are SBC's own policy decisions to limit competitor access and avoid regulatory scrutiny. Through SBC's reclassification of the combined UNE components of Project Pronto as a "service", SBC has effectively announced (1) its unilateral decision to change in the manner in which CLECs will be able to access the Project Pronto architecture, and (2) a limitation on the level of regulatory scrutiny of Project Pronto by removing it from the requirements of Sections 251 and 252 of the Act. Needless to say, both of these changes are anticompetitive.

⁷ Letter from James K. Smith, Executive Director-Federal Regulatory for SBC Communications, Inc. to Ms. Magalie Roman Salas, Esq., Secretary, FCC, at cover page, CC Docket No. 98-141, (May 11, 2000); Compare to March 1 Transcript at 6:9-10.

⁸ In Re Petition for Review and Approval of the Draft Application by SBC Communications, Inc., Nevada Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Nevada Bell Long Distance, for provision of in-region interLATA services in Nevada, Transcript of Proceedings, vol. 1, at 58:12-22, Public Utilities Commission of Nevada, Docket No. 00-7031 (October 24, 2000).

SBC's offering of a service resale version of the Project Pronto offering does not mitigate these concerns. CLECs who resell the SBC offering are limited to SBC's chosen technology and its choice and timing of adoption of other technologies, whether or not compatible with the needs of the CLECs or their customers.⁹ A core reason for having the ILECs unbundle their networks is precisely to avoid having competition bound by the technology and deployment choices made by the ILECs. In addition, it is clear from capital market trends that resale of advanced or other telecommunications services is not valued by investors as a viable business strategy for new market entrants. The ability of the new entrants to obtain their full Section 251/252 rights to all portions of the SBC network is important to their ability to attract capital to carry out their competitive business plans.

II. The FCC Should Require SBC To Permit Unrestricted and Nondiscriminatory Use of the Unbundled Project Pronto Loop Element

ATG agrees that competitors purchasing the unbundled loop network element separately or as part of the UNE "platform" must have the same ability to access the SBC Broadband Offering as any other competitive carrier, and that the FCC should modify its Order in this proceeding in that respect. This will permit all carriers to have access to the Project Pronto architecture in the same manner as they do other portions of SBC's network. There is no reason why this particular portion of the network should be treated in any other manner.

⁹ SBC's experts readily admitted that the current Project Pronto technology choice does not currently support SDSL, HDSL or IDSL, and that CLECs have a legitimate interest in the choice of technology supported by SBC in its Project Pronto network. March 1 Transcript at 98:13-101:14. SBC made its Project Pronto technology choice in January or February of 1999, fixing the generation of SBC technology deployment at that available for evaluation in late 1998. *Id.* At 101:16-102:19. Of course, other technology options were available

III. SBC Committed A *Per Se* Violation of the Merger Conditions

ATG supports CompTel's demonstration that SBC's ILEC has encroached on a function that was the sole responsibility of the advanced services affiliate, by undertaking a massive network reconfiguration for the primary purpose of expanding the number of new customers who have access solely to SBC and its affiliate's provision of advanced services. ATG agrees that the limited exception to the requirements of the merger conditions must be understood as being constrained by its purpose, which was limited to the network planning necessary to "minimize any disruption to the efficient and timely delivery of Advanced Services to customers. . . to permit an orderly transition to the steady-state provisioning of Advanced Services. . . ."¹⁰ This is a limited authority, and was not intended to allow SBC to become its own affiliate, which is essentially what SBC has done in this respect. The Commission's acceptance of SBC's interpretation of the scope of its authority during the transition period undermines SBC's obligations under the merger conditions, by giving SBC the ability to create a cosmetic affiliate and use it for avoidance of its obligations under the Federal Telecommunications Act and this Commission's rules.

IV. The FCC Should Require a New Transition Period Prior to SBC Being Allowed to Benefit From the Modification

ATG agrees with CompTel that, where new pre-order, order, and provisioning processes and systems are required for CLECs to access the new Pronto architecture/network configuration, CLECs must not be disadvantaged relative to SBC's ILECs or affiliate, separately or in combination. ATG supports CompTel's suggestion that the fair and non-discriminatory way to do this would be for the CLECs' and SBC's

at that time, and significant new ones have opened since that time. Nevertheless CLECs are confined to SBC's choice of technology due to the limitations of Project Pronto's architecture.

¹⁰ Merger Conditions, ¶ 4.n.

advanced services affiliate to be enabled to “take delivery” of the Pronto network at the same time, so that all carriers could take advantage of the offering at the same time.

Indeed, SBC itself has repeatedly recognized the competitive significance of simultaneous opening of markets to competition. In prepared testimony given to a subcommittee of the United States Senate Judiciary Committee in 1998, Royce Caldwell, the President of SBC Operations quoted favorably 1995 House Commerce Committee testimony by SBC’s Chairman and CEO, in which “Mr. Whitacre stated unequivocally that any legislation passed by Congress must permit all providers to compete in all markets, open all markets to all participants at the same time, and ensure that whatever regulation is retained is competitively neutral.”¹¹

CompTel has demonstrated that SBC’s advanced services affiliate is being given preferential treatment and a critical lead in getting to market with its chosen technology. For example, the integrated voice/data service will not be available to competitive carriers at the same time as SBC’s affiliate in combination with the ILEC. At the October 24, 2000 Project Pronto Industry Collaborative meeting, SBC stated that it will not even *begin* a trial of the product for weeks. Significantly, the reason given for this delay was *not* that SBC had not chosen an engineering design or specifications for the product—it admitted that it has already done so. However, SBC stated that it has not resolved its own internal process issues relative to product introduction and implementation. Despite the fact that it has chosen and designed the technology for the product, SBC has not yet made any information available to competitors through technical publications or otherwise to permit them to

¹¹ Testimony of Royce Caldwell, Before the Antitrust, Business Rights and Competition Subcommittee, Senate Judiciary Committee, March 4, 1998.

evaluate the product and to participate meaningfully in the trials or the evaluation. In addition, SBC has allowed itself effectively less than a month for the trial to product introduction in early December, to meet the requirements of the Commission's order granting the requested modification. It appears unlikely that SBC will have an adequately tested, useful product at that time, especially because the CLECs will not even know the technical specifications of the product for long, if at all, before the trial begins.¹²

SBC also continues to place other obstacles in the path of CLECs who wish to deploy their own facilities through collocation in the SBC Project Pronto remote terminals. At the March 1, 2000 meeting with the CLEC community, SBC stated that it was working on increasing the size of the remote terminals on new builds to accommodate competitor equipment. At the October 24 meeting with CLECs, SBC announced that it was "supersizing" all of its Project Pronto remote terminal cabinets effective September 15, 2000, to permit the collocation of competitor equipment. However, on October 26, 2000, Advanced Fiber Communications (AFC), one of SBC's two suppliers of Project Pronto terminals, announced a new agreement with SBC to supply, among other things, remote terminal cabinets for SBC's Project Pronto "through 2004."¹³ AFC's identification of the specific cabinets which it will supply to SBC under this new agreement, shows that the "240

¹² SBC recognizes, for its own part, the essential nature of offering a combined product. On October 30, 2000, SBC's venture capital arm announced a \$47 million investment in a leading voice over broadband technology company. Anticipating the press release, C/NET commented: "This voice-over-broadband gear is primarily intended for small and mid-sized businesses, offering them Net access in addition to several office phones at a fraction of the usual cost. These new equipment makers largely have targeted smaller competitive local-phone providers, touting the technology as a means of stealing market share from the major incumbent local-phone companies such as SBC, BellSouth and Verizon. But now the Baby Bells, which account for most of the nation's DSL launches, are beginning to look to the new technology to maximize their existing phone networks." C/NET, 10/29/00, <http://www.news.cnet.com>.

¹³ AFC Press Release, 10/26/2000

Line Remote Subscriber Cabinet D", one of the two types of the cabinets to be supplied, does not have space for competitor collocation of equipment.¹⁴

These facts alone justify the adoption of the 90 day mandatory transition period proposed by CompTel. Without this transition period, SBC's affiliate will have unfettered ability to deploy this service in combination with SBC and tie up customers under contract, effectively delaying the ability of CLECs and others from being able to obtain a toehold in this market until the terms of those contracts have tolled, and blocking CLECs from collocation in the remote terminal cabinets which is necessary for CLECs to compete with SBC on technology and price.

V. Conclusion

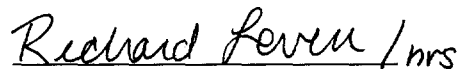
For all of these reasons, ATG urges the Commission to grant in full CompTel's Petition for Reconsideration.

Respectfully submitted,

/hrs

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Dated: November 2, 2000

¹⁴ <http://www.afc.com/Literature>